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No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW MEXICO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

STUART A. SMITH
Assistant to the Solicitor General

JONATHAN S. COHEN
JOHN J. MCCARTHY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether contractors of the United States Department of Energy, engaged for the management and operation of government-owned atomic research laboratories, are agents of the United States so that payments made by the contractors with funds of the federal government to procure goods and to pay for the operational costs of the laboratories are constitutionally immune from the New Mexico gross receipts and compensating use taxes.

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*In addition to the State of New Mexico, the other respondents herein are the Bureau of Revenue of the State of New Mexico, and Fred L. O'Cheskey, as Commissioner of Revenue of and for the State of New Mexico.

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the district court (App. A, *infra*, 1a–10a) is reported at 455 F. Supp. 993. The opinion of the court of appeals (App. B, *infra*, 11a–28a) is reported at 624 F.2d 111.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 29a–30a) was entered on June 2, 1980. By orders of August 15, and September 19, 1980, Mr. Justice White extended the time within which a petition for a writ of certiorari could be filed to and including October 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent parts of New Mexico's Gross Receipts and Compensating Tax Act, N.M. Stat. Ann. 1953, §§ 72-16A-3, 72-16A-4, 72-16A-7, 72-16A-12, 76-16A-12.1, 72-16A-12.2, 72-16A-14, and 72-16A-14.9 (Supp. 1975), are set forth in App. D, *infra*, 31a–34a.

STATEMENT

1. Sandia Corporation was organized in 1949 as a special subsidiary of Western Electric Company, Inc., for the purpose of performing research and development for the United States Atomic Energy Commission (now the Department of Energy—DOE) in New Mexico. It is not involved in any private work, receives no fee or profit under its contract, and owns no property except the $1,000

in United States bonds that constitutes its paid-in capital (App. A, *infra*, 3a).

The Zia Company is a subsidiary of Santa Fe Industries, Inc. Since 1946, Zia has performed a variety of management, operational, maintenance, architect-engineer, procurement, and related functions in connection with DOE's Los Alamos Scientific Laboratory. Zia performs separate private work with a distinct set of records, employees and locations. Virtually none of Zia's private property is involved in performance of its contract with DOE (App. A, *infra*, 3a; App. B, *infra*, 14a).

Los Alamos Constructors, Inc. (LACI) is a subsidiary of the Zia Company. It performs construction work in support of the Los Alamos Scientific Laboratory. LACI owns no property and makes no purchases. Rather, it procures the property it needs for performance of its Los Alamos contract through Zia. Zia and LACI are paid fixed fees annually for work performed under their contracts with DOE (App. A, *infra*, 3a; App. B, *infra*, 14a).

The management contracts between DOE and Sandia, Zia, and LACI are standard Atomic Energy Commission (now DOE) management contracts. This type of contract was developed to facilitate the Atomic Energy Commission's heavy reliance on private industry in the construction and management of large research and development facilities (App. B, *infra*, 13a). The standard DOE management contract provides that title to all tangible personal property passes directly to the government from the vendor. Thus, the contractors do not own any of the tangible personal property they procure. Moreover, the contract also places the risk of loss upon the government for property procured under the contracts. Finally, the contract provides for government control over the disposition of the property and government approval of property management procedures employed by each contractor (App. A, *infra*, 4a).

The tangible personal property procured by Sandia and Zia and all other operational costs incurred under the contracts, such as salaries, are paid for under an "advanced

funding" procedure. Under this procedure, the contractors pay their vendors and employees with drafts drawn directly on United States Treasury funds maintained in a depository bank account, under the authority of a letter of credit to cover withdrawals (App. A, *infra*, 4a).

The "advanced funding" procedure involves the establishment of a special bank account by the contractor, the United States, and a designated bank, pursuant to a three-party contract. The United States owns any balance in the account, but the contractor has the right to execute drafts payable to third parties in order to pay any expenses incurred in performing the underlying government contract. DOE thereupon issues a letter of credit to an appropriate Federal Reserve Bank in favor of the contractor. The letter of credit provides the general authority for the Federal Reserve Bank to make United States Treasury funds available for deposit in the special bank account. When a contractor incurs an expense under the contract, it pays the expense by executing a draft payable to the creditor and drawn on the special bank account. At the same time, the contractor or the bank executes a payment voucher in an amount sufficient to cover the draft and the Federal Reserve Bank, on the basis of the voucher, transfers funds into the special bank account (App. B, *infra*, 22a n.8).

Under the contract, the government owns the funds in the special accounts and controls the disposition of such funds. The liability provisions of the contract require the government to pay all operational costs and further stipulate that no contractor funds are to be used to pay for contract costs. Obligations that are "properly incurred" by the contractors are therefore considered to be DOE liabilities. Hence, if the government failed to provide funding, the contractors would be excused from performance of the contracts and the government would be liable for all properly incurred and reported claims (App. A, *infra*, 4a-5a).

Prior to July 1, 1977, DOE's contracts with Sandia, Zia, and LACI did not characterize the contractors as "agents"

of the government. On that date (which was during the pendency of this litigation), the contracts were modified to recognize the "'long standing agency status and authority' of the contractors 'for certain purposes'" (App. A, *infra*, 6a). The amendments also stated that they "shall not be construed to modify any other provisions of the contract * * * nor shall [they] create rights or obligations not otherwise provided for in the contract" (App. B, *infra*, 26a).

2. The New Mexico gross receipts tax is levied upon sales proceeds realized by retailers of tangible personal property (a sales tax) and upon the gross receipts realized by persons engaged in the construction business or in performing services of a professional, technical, or scientific nature. There is also a compensating tax equivalent to the gross receipts (sales) tax that is imposed upon the use of tangible personal property that has been imported into and used within the State without the payment of any gross receipts (sales) taxes. See App. D, *infra*, 31a-34a.

Prior to 1967, the New Mexico Bureau of Revenue acknowledged the existence of an agency relation between these contractors and the United States and imposed no taxes on the type of transactions involved in this case. In 1967, however, the State changed its position with respect to the relationship between the contractors and the government sought to impose such taxes on the ground that the contractors were not government agents (App. A, *infra*, 6a).

The government thereafter brought this action in the United States District Court for the District of New Mexico for a declaratory judgment that sales of tangible personal property to DOE, through its management contractors Sandia and Zia, are sales to the United States that are exempt from the New Mexico gross receipts and compensating taxes, and that the advanced funds disbursed under the management contracts here are not subject to such taxes (App. A, *infra*, 1a-2a; App. B, *infra*, 11a-12a).

3. The district court concluded "that Sandia and Zia are procurement agents of the United States and that any sales of tangible personal property to them are sales to the United States through its procurement agents, which are not subject to the 4% gross receipts tax imposed by the New Mexico Gross Receipts and Compensating Tax Act" (App. A, *infra*, 7a). It also held that the contractors were not subject to the compensating tax for their purchases of tangible personal property in other states (*ibid.*).

Finally, the district court held that the advanced funds disbursed by Sandia, Zia and LACI were not compensation for services subject to the New Mexico gross receipts tax but were funds that belonged to the government and were disbursed by the contractors to pay operational costs. In support of this conclusion, the district court observed that Zia and LACI received a fixed fee as compensation for their services, upon which they paid gross receipts taxes, and that Sandia received no fixed fee or profit. Moreover, the court pointed out with respect to the advanced funds procedure that the funds deposited by DOE in the special bank accounts were the only monies available for payment of all of the contractors' operational costs. They were not to be disbursed in any manner inconsistent with contract performance. DOE could exert direct control over the disbursement of the funds and retained title to the funds while they were on deposit with the bank (App. A, *infra*, 8a-9a). Accordingly, the district court upheld the government contractors' immunity from New Mexico gross receipts and compensating use taxes and entered a declaratory judgment in favor of the government (*id.* at 10a).

4. The court of appeals reversed (App. B, *infra*, 11a-28a). It held that Sandia, Zia and LACI were not agents of the United States and were therefore subject to New Mexico gross receipts and compensating use taxes. After reviewing this Court's decisions dealing with the state tax immunity of government contractors, the court of appeals acknowledged that "[a]lthough there is language in these Supreme Court opinions suggesting that the results turn on traditional agency principles * * *, it seems evident

that the Court is more concerned with preserving the delicate financial balance between our co-existing sovereignties than with rigid adherence to agency law terminology" (App. B, *infra*, 17a). The court of appeals further observed that "[t]he trend toward restricting tax immunities * * * reflects an awareness of the serious threat posed to state revenues by ballooning governmental dealings in the private sector" (*ibid.*).

In holding that the contractors were not agents, the court of appeals attempted to distinguish two decisions of this Court—*Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110 (1954), and *Livingston* v. *United States*, 364 U.S. 281 (1960) (per curiam), aff'g 179 F. Supp. 9 (E.D.S.C. 1959) (three-judge court)—which upheld the immunity of contractors from state sales taxes on the ground that they were agents of the government. As the court of appeals viewed the matter, the language in the request for bids, the contract, and the purchase order in *Kern-Limerick* more "clearly and uniformly disclosed an intention for the government to be directly obligated to the vendor for the contractor's purchases" (App. B, *infra*, 15a). Moreover, the court sought to distinguish *Livingston* on the ground that the contractor in that case earned no fee (*id.* at 16a), although in considering the fact that Sandia likewise earned no fee, the court of appeals "decline[d] to hang agency status, and thereby the welfare of state treasuries, on the existence or amount of a fee" (*id.* at 25a).

Finally, the court rejected the government's argument that the advanced funding procedure conclusively established that Sandia, Zia and LACI were procurement agents that pledged the credit of the United States vis-a-vis the third-party vendors. In the court's view, "[a]dvanced funding is simply another means of reimbursement devised by accountants to eliminate major weaknesses in the government's bookkeeping practices" (*id.* at 23a).

REASONS FOR GRANTING THE PETITION

In holding that government contractors, engaged to manage government-owned atomic research laboratories

and to procure property for such purposes with funds advanced by the federal government, were not agents of the United States and were therefore subject to state gross receipts taxes, the decision of the court of appeals represents a fundamental departure from the governmental tax immunity precedents of this Court, *viz.*, *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110 (1954), and *Livingston* v. *United States*, 364 U.S. 281 (1960) (per curiam), aff'g 179 F. Supp. 9 (E.D.S.C. 1959). Moreover, the decision below squarely conflicts with *United States* v. *Boyd*, 211 Tenn. 139, 363 S.W. 2d 193 (1962), aff'd on another issue, 378 U.S. 39 (1964), and *United States* v. *Nevada Tax Commission*, 439 F.2d 435 (9th Cir. 1971), aff'g 291 F. Supp. 530 (D. Nev. 1968).

The issue is important to the Department of Energy because it maintains numerous contractual relationships with private parties engaged in operating federally-owned laboratories devoted to research, development, and production of nuclear material and devices. Under these standard DOE contracts, the United States must pay all operational costs of the laboratories, including all state taxes. The sums involved are indisputably substantial. If the decision below stands, the Department of Energy estimates that it will owe more than $100 million to the State of New Mexico for the years from 1970 to date, and $20 million annually for future years. When these figures are extrapolated over the large number of agreements DOE has outstanding with other private contractors to perform services in this vital field of scientific research, the fiscal impact of the question presented assumes even greater significance.

Under the present state of the decisional law, the court below, on the one hand, and the Ninth Circuit and the Supreme Court of Tennessee, on the other hand, have adopted opposing views as to whether the standard DOE management contract immunizes the contractor from state sales taxes under *Kern-Limerick*. Tennessee (where DOE maintains substantial facilities) and states in the Ninth Circuit (such as Nevada and California) may not impose

and collect such taxes, but those in the Tenth Circuit such as respondent New Mexico are free to do so. Such a situation is fundamentally unfair. There should be a uniform national rule to which all the states and the federal government should be bound regarding the state tax consequences of the operations under such an important federal contract. This Court should resolve the conflict of decisions and thereby establish uniform immunity rules for the guidance of the state tax authorities, the federal government, and its contractors.

1.a. In *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court first announced the doctrine that the federal government is immune from state taxation. "[U]nshaken, rarely questioned * * * is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation." *United States* v. *County of Allegheny*, 322 U.S. 174, 177 (1944). See also *Department of Employment* v. *United States*, 385 U.S. 355 (1966); *United States* v. *Mississippi Tax Commission*, 421 U.S. 599, 612-613 (1975). Federal tax immunity is "the unavoidable consequence of that supremacy which the constitution has declared." *McCulloch* v. *Maryland*, *supra*, 17 U.S. (4 Wheat.) at 436.

In determining the reaches of the federal government's constitutional immunity from state taxation, this Court has often extended the doctrine to protect private contractors who act on behalf of the United States. Thus, prior to *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941), it had been held that a private contractor could not be subject to state taxation in connection with his performance of a government contract if he could pass the cost of the tax on to the federal government. However, in *King & Boozer* the Court abandoned this "economic burden" test and ruled that federal sovereignty "does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity" (314 U.S. at 9). There, however, the legal incidence of the tax was on the

private vendors, and the contracts provided that the contractor was to purchase the materials in its own name and on its own credit. The government was not bound by the contractors' purchase contracts but would reimburse the contractor only after the goods were delivered and inspected. In those circumstances, the Court concluded that the government's prerogatives under the contracts did not confer upon the contractor the status of an agent empowered to pledge the credit of the United States (see *id.* at 13).

Kern-Limerick, Inc. v. *Scurlock*, *supra*, employed the Court's earlier analysis in *King & Boozer* in holding that a federal contractor was entitled to immunity from state sales tax if it was an agent of the federal government empowered to pledge the credit of the United States. There, the Court held unconstitutional the Arkansas sales tax as applied to purchases by a government contractor under a cost-plus-fixed fee contract, where the pertinent documents made it clear that the contractor was acting as a purchasing agent for the government, title to the goods purchased passed directly from the vendor to the government, and the government was directly liable for payment of the purchase price. Accordingly, the Court concluded that "the Government is the disclosed purchaser and that no liability of the purchasing agent to the seller arises from the transaction" (347 U.S. at 121; footnote omitted).

b. The decision rejecting the claimed immunity of the contractors in this case is difficult to square with *Kern-Limerick*. Here, as in *Kern-Limerick*, the DOE management contracts to which Sandia, Zia and LACI were parties provided that title to all tangible personal property passed directly to the government from the vendors, as well as placing the risk of loss directly on the government for property acquired under the contracts. The contracts further provided for government control over the disposition of the property and approval of property management procedures employed by each contractor. Finally, the advanced funding arrangement, under which the contractors did not expend any of their own funds for goods or serv-

ices but were able to disburse monies that at all times belonged to the government, "gave to the contractors the status of agents of the Government to enter into contracts or to pledge its credit." *Alabama* v. *King & Boozer*, *supra*, 314 U.S. at 13. As the Fourth Circuit correctly observed in *United States* v. *Forst*, 569 F.2d 811 (1978), "the key factor in the case was whether the credit of the United States or the contractor was bound by the purchasing agreements" (*id.* at 811). Since Sandia, Zia, and LACI were empowered to write checks on government-owned funds, their power to bind the United States and pledge its credit cannot seriously be questioned.

Contrary to the court of appeals' conclusion, the advanced funding procedure cannot be dismissed as "simply another means of reimbursement devised by accountants * * *" (App. B, *infra*, 23a). There is a considerable difference between the case where the contractor expends its own funds and must await reimbursement by the government and the case in which the contractor is empowered to draw directly on the funds of the government. While the former case may not be inconsistent with an agency relationship (as *Kern-Limerick* itself demonstrates), it is at least clear that in such a case the contractor must rely upon the government's ratification of its actions in order to obtain reimbursement for its outlays. Here, on the other hand, the contractors did not even take that risk, for they disbursed *government* funds to the vendors and to their employees in the first instance. In every sense of the word, the contractors here acted on behalf of the government vis-a-vis the vendors. If the contractor receiving after-the-fact reimbursement in *Kern-Limerick* was deemed to be an agent of the United States and thereby immune from state taxes, there is, in this respect at least, a stronger case for immunity here because the contractors had the additional authority to disburse government-owned funds and pledge the credit of the United States.

Although the court of appeals acknowledged that this created "appearances" of agency status for the contractors (App. B, *infra*, 22a), it resisted the conclusion that the

contractors were immune from state taxes, relying on the fact that "[a]t most, the contractor may pledge to the limit of its letter of credit" (*id.* at 22a-23a). As the court reasoned, "[s]een in this light, Sandia, Zia and LACI are like numerous businesses which deal under letters of credit from banks and other sureties" (*id.* at 23a).

But the conclusion that the contractors' purchases and disbursements were subject to state gross receipts taxes does not follow from the fact that their letters of credit were limited in amount. The claim of immunity here is only coextensive with the contractors' authority to act on behalf of the government. The fact that their authority was limited in dollar amounts does not refute the argument that they acted as agents of the government within the scope of their authority. Indeed, it requires no citation of authority that the acts of an agent are attributable to his principal to the extent they are within the scope of the agent's authority. Simply because there is some limit upon the agent's authority does not cast doubt upon the existence of the agency relationship itself.

c. The decision below also conflicts with *Livingston* v. *United States*, *supra*. There, this Court summarily affirmed a three-judge district court's decision that a South Carolina sales tax could not be imposed upon a contractor's purchases under a similar DOE standard management contract. The court of appeals sought to distinguish the case on the ground that it turned on the fact that the contractor earned no fee from the contract (App. B, *infra*, 16a), in much the same fashion as this Court distinguished *Livingston* in *United States* v. *Boyd*, *supra*, 378 U.S. at 45 n.6. However, the court of appeals also expressed doubt that "such a factual determination would today withstand appellate review" (App. B, *infra*, 24a; footnote omitted) and therefore "decline[d] to hang agency status, and thereby the welfare of state treasuries, on the existence or amount of a fee" (*id.* at 25a).

But whatever the merits of such a distinction, the undisputed fact is that Sandia received no fee or profit under

its contract with DOE (App. A, *infra*, 3a). Hence, a square conflict with *Livingston* exists at least to the extent of New Mexico's power to impose its tax on Sandia.

2. Nor does the fact "that the agency terminology does not appear uniformly in all the documents relating to the contracts" (App. B, *infra*, 26a) effectively distinguish this case from *Kern-Limerick*, as the court of appeals apparently believed. Much the same argument was advanced by the State of Tennessee and rejected by the Tennessee Supreme Court in *United States* v. *Boyd*, 211 Tenn. 139, 363 S.W.2d 193 (1962), aff'd on another issue, 378 U.S. 39 (1964). There, the Tennessee court held that the contractor under the identical standard DOE management contract with advanced funding was immune from state sales taxes. In response to the argument that the contract did not in all respects employ the identical *Kern-Limerick* terminology of "agency," the court stated, in terms that are equally appropriate here (211 Tenn. at 155; 363 S.W. 2d at 200):

> The mere placing of terms such as agent or independent contractor in the contract does not make them such in law. The surrounding facts and circumstances determine the relationship.
>
> It appears from the contract and from the actions of the parties that the relationship of agency in so far as the purchase of materials are [*sic*] concerned when accomplished in accordance with the contract bring them within the holding of Kern-Limerick and under that case the A.E.C. is the purchaser. Therefore, the Sales Tax would be a direct tax upon the Government and is invalid under the doctrine of implied immunity, and we so hold.

Boyd therefore likewise conflicts with the decision below.[1]

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[1] The conflict upon which we rely between the decision below and *Boyd* is with the sales tax portion of *Boyd* that was considered by the Tennessee Supreme Court, which the State did not appeal to this Court (see 378 U.S. at 43 n.5). The issue before this Court was the constitutionality of the state use tax as applied to the contractor. This Court affirmed the Tennessee Supreme Court's holding that the State

3. Finally, the decision below squarely conflicts with *United States* v. *Nevada Tax Commission*, 291 F. Supp. 530 (D. Nev. 1968), aff'd, 439 F.2d 435 (9th Cir. 1971), a case that the court of appeals here conspicuously ignored. There, as here, the state sought to impose its sales and compensating use tax upon a government contractor's purchase and use of tangible personal property under the identical standard DOE contract. In accordance with the advanced funding procedure, the contractor purchased the property with government-owned funds, and title to the property vested immediately in the government. Relying on *Kern-Limerick*, the district court upheld the contractor's claim that the sales were immune from a comparable Nevada sales and compensating use tax modeled after a California statute. As the court there concluded, "all sales by retailers to [the contractor] under this contract, the purchase price being paid by the Government and title passing immediately to the Government, are sales to the United States immune from the Nevada Sales Tax" (291 F. Supp. at 533). The Ninth Circuit simply affirmed "[f]or the

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could impose a tax on a government contractor on the use of tangible personal property in the performance of a contract because the contractor had not been "so incorporated into the government structure as to become instrumentalities of the United States and thus enjoy governmental immunity" (*id.* at 48).

Contrary to the court of appeals' conclusion (App. B, *infra*, 20a n.7), this Court's use tax holding in *Boyd* does not support its ruling that Sandia, Zia, and LACI were not agents and therefore not immune from the New Mexico sales tax. The Tennessee use tax at issue in *Boyd* was not a compensating use tax of the type involved in this case, which is meant to complement a sales tax by levying a tax upon out-of-state purchases. See, *e.g.*, *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, 336–337 (1944). Rather, the Tennessee use tax was imposed upon the use of property as a privilege irrespective of the title of the property or its importation (see 378 U.S. at 40–41 n.3). This type of use tax was considered and upheld by the Court in the so-called "Michigan cases." See *United States* v. *City of Detroit*, 355 U.S. 466 (1958); *City of Detroit* v. *Murray Corp. of America*, 355 U.S. 489 (1958); and *United States* v. *Township of Muskegon*, 355 U.S. 484 (1958). Hence, the court of appeals' reliance on this Court's use tax holding in *Boyd* is entirely misplaced.

reasons stated in the reported decision of the district court" (439 F.2d at 441).

Finally, the court of appeals stated that it was "highly skeptical of the sporadic addition of 'magic words' to a contract in an attempt to avoid state taxation" (App. B, *infra*, 26a). But this Court in *Kern-Limerick* harbored no such doubts. In that seminal decision, from which the court below departed, this Court concluded that "the form of contracts, when governmental immunity is not waived by Congress, may determine the effect of state taxation on federal agencies, for decisions consistently prohibit taxes levied on the property or purchases of the Government itself" (347 U.S. at 122–123; footnotes omitted). The confusion that has arisen in the lower courts about the meaning of *Kern-Limerick*, which will produce discrepancies in the ability of various states to tax essentially identical transactions, calls for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

STUART A. SMITH
Assistant to the Solicitor General

JONATHAN S. COHEN
JOHN J. MCCARTHY
Attorneys

OCTOBER 1980

APPENDIX A

United States District Court

DISTRICT OF NEW MEXICO

No. 75-48-M

[Filed August 4, 1978]

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF NEW MEXICO, BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, AND FRED L. O'CHESKEY, AS COMMISSIONER OF REVENUE OF AND FOR THE STATE OF NEW MEXICO AND HIS SUCCESSORS IN OFFICE, DEFENDANTS.

MEMORANDUM OPINION

MECHEM, *District Judge.*

This matter is before the Court on cross-motions for summary judgment. The parties are in agreement that there is no genuine issue of material fact, and I find that it is proper to grant summary judgment in favor of the plaintiff on the basis of the law and the affidavits, exhibits, depositions and interrogatories on file in this case. The following shall constitute my findings of fact and conclusions of law. Jurisdiction exists over the parties and the subject matter.

In this action the United States is seeking a declaratory judgment that, in light of the Constitution and the laws of the United States and New Mexico:

1. Sales of tangible personal property to Energy Research and Development Administration (ERDA), through its management contractors, Sandia Corporation (Sandia) and the Zia Company (Zia), are sales to the United States which are not subject to the 4% gross receipt tax nor to the compensating tax imposed by the New Mexico Gross Receipts and Compensating Tax Act; and

2. U.S. Government advanced funds used for Government operations under ERDA management contracts with Sandia, Zia and Los Alamos Constructors, Inc. (LACI), are not subject to the 4% gross receipts tax imposed by the New Mexico Gross Receipts and Compensating Tax Act; and

3. The United States has the right to be a party to administrative tax proceedings before the New Mexico Commissioner of Revenue wherein tax liabilities of the contractors or their vendors are at issue.

The State Bureau of Revenue (Bureau) claims that the contractors are subject to these taxes because they are not the agents of the government but are instead independent contractors who are reimbursed for the performance of services under their contracts with ERDA, the costs of which include employees salaries, suppliers', subcontractors' and other costs of engaging in business in New Mexico. The State further claims that the United States has no right to be a party to the administrative tax proceedings because it is not the "taxpayer" under Section 72-13-15(0), N.M.S.A. 1975 Supp.

The resolution of the plaintiff's first claim depends upon whether the tangible personal property is sold to the contractor, or to the United States or its agents. A vendor's receipts from sale to the United States or its agents are non-taxable under the New Mexico Gross Receipts and Compensating Tax Act. Sections 72-16A-1 to 72-16A-19, N.M.S.A. 1975 Supp. The United States is claiming to be the party to whom the property is sold through its procurement agents, Sandia and Zia, and seeks to invoke the deduction provision of Section 72-16A-14.9 which provides in part:

> Receipts from selling tangible personal property . . . to the United States or any agency or instrumentality thereof or the State of New Mexico or any political subdivision thereof may be deducted from gross receipts.

The Bureau has refused to authorize the issuance of appropriate nontaxable transaction certificates to these contractors on the basis that they are not the agents or instrumentalities of the United States and therefore any sales of tangible personal property to them are not sales to the United States.

An analysis of the contractual relationship between the United States and the contractors will establish to whom the tangible personal property is sold.

Sandia is a special subsidiary of Western Electric Company, Inc. and operator, since 1949, of the Government-owned Sandia Laboratories; Sandia was created and exists exclusively to perform Government research and development. It receives no fee or profit, owns no property except $1,000 in Government bonds constituting its nominal paid-in capital, and does not perform any private work.

Zia has been performing, since 1946, management, operational, maintenance, architect-engineer, procurement, and related work which facilitates ERDA research and development functions at the Los Alamos Scientific Laboratory. Although Zia owns property and performs separate private work, none of its property is involved in performance of the ERDA contract, and Zia keeps a distinct set of records which are owned by and maintained for the Government, and relate to the performance of the ERDA contract. In addition, all private work is performed by different employees in separate sections of the company away from Los Alamos.

LACI is devoted exclusively to the performance of construction work in support of the Los Alamos Scientific Laboratory, a wholly-owned government research and development facility. LACI is a separate corporation managed by Zia, and owns no tangible personal property. Zia procures all tangible personal property needed in per-

formance of the LACI-ERDA contract; LACI makes no purchases. Both Sandia and Zia procure property needed for contract performance by issuing purchase orders or purchase contracts to sellers.

Zia and LACI are paid fixed fees annually for work performed under their contracts with ERDA. Gross receipts taxes have been paid each year by Zia and LACI on these fixed fees, as compensation received for services rendered.

The ERDA management contracts involved in this case provide that title to all tangible personal property passes directly to the Government from the vendor; the contractors are not considered "owners" of any tangible personal property procured by them. Some tangible personal property is obtained directly from government sources, title to which is vested in the Government. The contracts also place the risk of loss of property acquired under the contracts upon the Government and provide for Government control over the disposition of the property and approval of property management procedures employed by each contractor.

The tangible personal property procured by the contractors and all other operational costs such as salaries, are paid for by the use of an "advanced funding" arrangement whereby funds are deposited into government bank accounts by way of letters of credit, and payments are made from these government funds by the issuance of drafts drawn by the contractors on the accounts. The Bureau claims that these funds are paid to the contractors as reimbursement for their own costs, and as compensation for services rendered. A review of the funding arrangements, agreements with the banks which provide for Government ownership of the funds in the accounts and control over the disposition thereof, and the liability provisions in the contracts which recognize the Government's obligation to pay all operational costs, indicates that no contractor funds are used to pay for contract costs. Instead, the contractors are empowered to pledge the credit of the Government. Obligations that are "properly in-

curred" by the contractors (that is, without willful misconduct or bad faith on the part of the contractors) are considered to be ERDA liabilities. If the Government failed to provide funding, the contractors would be excused from performance of the contracts, and the Government would be liable for all properly incurred and reported claims. The advanced funding scheme is not a system by which the contractors are reimbursed for their direct costs under the contract.

The contractual relationship of the contractors and the Government in this case is not the same as the typical cost-plus-fixed-fee contractor, such as the one in *Alabama* v. *King & Boozer*, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1949), who was obligated to pay its costs from its own funds, and was directly liable to obligees and was subsequently reimbursed by the Government. The facts in *King & Boozer*, supra, make it clear that no agency relationship existed.

Recognizing the constitutional prohibition against state taxation of the United States, *McCulloch* v. *Maryland*, 4 Wheat. 316, 4 L.Ed. 579, the Supreme Court in *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 74 S. Ct. 403, 98 L.Ed. 546 (1954), held that a Government contractor may be exempt from or immune to taxes if the contractor is the agent of the United States. The same rationale is behind the New Mexico tax here in question, which exempts a vendor from paying gross receipts taxes on tangible personal property sold to the United States or its agents or instrumentalities. The contract in *Kern-Limerick* specifically named the contractor as the purchasing agent of the Government, and provided that the Government was directly liable to the vendors for obligations incurred by the contractor. For these reasons, the contractor was found to be the procurement agent of the United States and was thus exempt from the state taxes.

In determining whether the contractors in this case are the procurement agents of the Government, the surrounding facts and contract provisions must be analyzed. However, specific words naming the contractors as agents are not required, so long as it is clear from the contracts

and factual circumstances that the relationship is one of agency. *United States* v. *Livingston*, 179 F. Supp. 9 (E.D.S.C. 1959), aff'd per curiam, 364 U.S. 281, 80 S.Ct. 1611, 4 L.Ed.2d 1719 (1960); *United States* v. *Boyd*, 211 Tenn. 139, 363 S.W.2d 193 (1962).

Prior to July 1, 1977, the three contracts in this case did not use the word "agent" to define the relationship between the contractors and the Government, yet the method of operation and obligations set forth in those contracts would imply an agency relationship. The contracts were modified on July 1, 1977, during the course of this litigation; one of the reasons for this modification was to expressly recognize the "long standing agency status and authority" of the contractors "for certain purposes". Modification No. 30, Contract AT (29-1)-789, Supplemental Agreement. The Bureau recognized this agency relationship for a period of about twenty years before these modifications were made, during which time no taxes were claimed to be due on the advanced funds of the government as "gross receipts" of the contractors, nor on the revenue from sales of tangible personal property to these contractors. In 1967 the Bureau's position regarding the agency relationship of the contractors and the government changed, and this litigation ensued. The Bureau asserts that a federal agency may not legally modify a contract for the purpose of immunizing an otherwise-taxable entity from state taxes without Congressional authorization. This argument is disposed of by the conclusion that the Government and the contractors herein maintained an agency relationship for procurement purposes during the years of operation prior to the contract modifications, and have continued to do so to the present. They were not taxable before the modifications, because such modifications merely made the relationship more express, but did not change the agency relationship which had been in operation for three decades, and which had been recognized as such by the Bureau.

The Bureau argues that the purchase orders do not identify the contractors as the Government's agents, but instead, refer to them as "Buyers", and that the contrac-

tors are responsible for determining their needs, selecting buyers, negotiating price, and generally enjoying a great degree of responsibility and autonomy not normal to an agency relationship.

Just as the fact that title to tangible personal property passes directly from the vendor to the Government is insufficient in itself to establish an agency relationship, *Alabama* v. *King & Boozer*, supra, so too are the Bureau's arguments as set forth above insufficient to show the lack of such. *U.S.* v. *Bureau of Revenue*, 87 N.M. 164, 531 F.2d 212 (1975) (Hernandez, B.C. concurring). More important are the facts that these are management contracts, in existence for nearly thirty years, (not short term buyer-seller contracts) conducted in government-owned facilities, with government-owned funds, for the purpose of carrying out significant ERDA statutory responsibilities. The Government maintains control over the contractors' procurement systems, property management and disposal practices, method of payment of operational costs, and other operations under the contracts. In addition, the Government has the right of prior approval of all purchases above a certain amount as stated in the contracts. For these reasons and those discussed above, I conclude that Sandia and Zia are procurement agents of the United States and that any sales of tangible personal property to them are sales to the United States through its procurement agents, which are not subject to the 4% gross receipts tax imposed by the New Mexico Gross Receipts and Compensating Tax Act.

This determination is also dispositive of the question whether Sandia and Zia are liable for the compensating tax imposed on their purchases of tangible personal property in other states and brought into New Mexico for purposes of performing their contracts with ERDA. The New Mexico Court of Appeals recently held that "the legislature intended to make our gross receipts tax and our compensating tax correlate: an exemption from the gross receipts tax must also be treated as an exemption from the compensating tax." *Western Electric Company* v. *New*

Mexico Bureau of Revenue, 90 N.M. 164, 167, 561 P.2d 26, 29 (1976).

Although the state court's interpretation of its own taxing statute is not binding upon this court due to the federal question of Government immunity from state taxes, *First Agricultural National Bank* v. *Tax Commission*, 392 U.S. 339, 347, 88 S.Ct. 2173, 20 L.Ed.2d 1138 (1968), it is entitled to great weight and is conclusive if it is a reasonable interpretation in light of the operation of the statute. *American Oil Co.* v. *Neill*, 380 U.S. 451, 455–56, 85 S.Ct. 1130, 14 L.Ed.2d 1 (1965). There is nothing to indicate that the New Mexico court's interpretation noted above is anything but reasonable, especially in light of the purpose of the compensating tax, which is:

> . . . to protect New Mexico businessmen from the unfair competition that would otherwise result from the importation into the state of property without payment of a similar tax [as the gross receipts tax]. Section 72-16A-2 N.M. S.A. 1975 Supp.

Thus, the contractors are entitled to the deduction provision of the New Mexico Gross Receipts and Compensating Tax Act for purchases of tangible personal property both inside and outside New Mexico.

With regard to the Government's second claim, that the advanced funds are non-taxable under the New Mexico Gross Receipts Act, the language of the statute requires an analysis of whether these funds were "received" by the contractors, as compensation for services:

> 'gross receipts' means the total amount of money or the value of other consideration, received . . . from performing services in New Mexico . . . Section 72-16A-3(f) N.M.S.A. 1975 Supp.

The Bureau contends that the advanced funds are received by the contractor as payment for services not simply disbursed by the contractor as an agent to cover the cost of operations under the contracts.

The funds deposited in the special bank accounts by ERDA are the only monies available for payment of all of the contractor's operational costs. They are not to be dis-

bursed in any manner not consistent with contract performance; ERDA may exert direct control over the disbursement of the funds, and retains title thereto while they are on deposit with the bank. Zia and LACI receive a fixed fee as compensation for their services, upon which they pay gross receipt taxes; Sandia receives no fixed fee or profit. The Zia and LACI contracts prior to modification stated that "payment for allowable costs and of the fixed fee . . . shall constitute complete compensation for the contractor's services." Effective April 1, 1976, this language was modified as follows:

> As compensation for performance of work under this contract, the contractor shall be paid a fixed fee as hereinafter provided. Modification 66 to Zia contract, p. 12, and modification 56 to LACI contract, p. 12.

Judge Hernandez, in his special concurrence in *U.S. v. Bureau of Revenue*, supra, 87 N.M. at p. 168, 531 P.2d at p. 216, considered the language in the unmodified version of Zia and LACI's contract quoted above and found that it was meant "as merely a limitation upon the government's liability under the contract". Judge Hernandez held at p. 168, 531 P.2d at p. 216 that to construe it otherwise, in light of the contract as a whole, would be to unreasonably isolate certain words, and to strain their meaning "beyond ordinary or common usage". No other reasonable interpretation of this language is possible: the contract modifications simply clarify the intention of the parties and add support to the conclusion that the advanced funds are not meant to be compensation to the contractors.

Having found that these contractors are procurement agents of the United States, it follows that the funds which they use for operations are not received by them for services, but are funds which belong to the Government until they are used to pay operational costs. Therefore, the advanced funds are not "gross receipts" to the contractors, and they are not subject to the 4% gross receipts tax imposed by the New Mexico Gross Receipts and Compensating Tax Act.

With regard to the Government's third claim, it is clear from the foregoing that the United States is the real party

in interest and should be recognized as a party in any New Mexico administrative tax proceeding involving the three contractors involved herein or their vendors. The contracts here require the United States to pay all costs under the contracts including taxes. In *U.S.* v. *Bureau of Revenue*, supra, the New Mexico Court of Appeals held that this was sufficient to recognize the United States as a taxpayer under the statute and allow it to be a party in tax disputes with the Bureau. Similarly, federal cases have established that, in cases involving a challenge to state taxes as violating the Government's sovereign and constitutional rights, the United States must be permitted to participate as a party. *U.S.* v. *Bureau of Revenue*, 291 F.2d 677 (10th Cir. 1961); *Marquardt Corporation* v. *Weber County*, 360 F.2d 168 (10th Cir. 1966), expressly overruling *U.S.* v. *Bureau of Revenue*, 217 F.Supp. 849 (D.C.N.M. 1963) which held to the contrary.

Under the circumstances of this case, the United States is the "taxpayer" under Section 72-13-15(0), N.M.S.A. 1975 Supp. and must be given the opportunity to participate as a party in any administrative proceedings before the New Mexico Commissioner of Revenue involving the tax liabilities of Zia, Sandia, LACI or their vendors.

A declaratory judgment will be entered consistent with this opinion.

APPENDIX B

United States Court of Appeals

FOR THE TENTH CIRCUIT

No. 78-1755

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

STATE OF NEW MEXICO; BUREAU OF REVENUE OF THE STATE OF NEW MEXICO; AND FRED L. O'CHESKEY, AS COMMISSIONER OF REVENUE OF THE STATE OF NEW MEXICO AND HIS SUCCESSORS IN OFFICE, DEFENDANTS-APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Decided and Filed June 2, 1980

Before: McWILLIAMS, BARRETT AND McKAY, *Circuit Judges*

McKAY, *Circuit Judge*. The United States seeks a declaratory judgment defining the status for purposes of the New Mexico Gross Receipts and compensating Tax[1] of

[1] When this suit was instituted, the tax was codified at N.M. Stat. Ann. §§72-16A-1 through 72-16A-19 (Supp. 1975). The tax has since been amended and now constitutes N.M. Stat. Ann. §§7-9-1 through 7-9-81 (1978). Citations in this opinion conform to the earlier enumeration. We refer only to the gross receipts tax because a determination of liability or exemption under the gross receipts tax will apply as well to the compensation tax. *See Western Elec. Co.* v. *New Mexico Bureau of Revenue*, 90 N.M. 164, 169, 561 P. 2d 26, 29 (1976).

three private corporations under management contracts with the Energy Research and Development Administration (ERDA), the successor to the Atomic Energy Commission (AEC).[2] The government also seeks a declaration that, as a matter of constitutional law, it must be permitted to intervene in any New Mexico administrative proceeding involving the tax status of the three corporations.

The government's substantive arguments focus on whether the contractors are agents of the United States for certain functions.[3] As agents for the disbursement of federal funds, they would be constitutionally immune from application of the gross receipts tax to those funds.[4] *See*

[2] Initially, research and development for nuclear weapons was the responsibility of the Army Corps of Engineers. Responsibility was subsequently transferred to the AEC (January 1, 1947), the ERDA (January 19, 1975), and finally the Department of Energy (October 1, 1977). *See* Department of Energy Organization Act, 42 U.S.C. §§7101 *et seq.*

[3] Other potential issues were resolved by a companion case in this court and a prior action between these parties in a state court. In *United States* v. *New Mexico*, 581 F.2d 803 (10th Cir. 1978), we determined the incidence of the gross receipts tax. In *United States* v. *Bureau of Revenue*, 87 N.M. 164, 531 P. 2d 212 (Ct.App. 1975), the New Mexico Court of Appeals held that the state was estopped from collecting assessments from two of the contractors for the period January 1, 1966, to June 30, 1967. The Bureau of Revenue had previously considered the contractors to be agents and had not given notice of its change of position. Lack of sufficient notice is not an obstacle to this suit. We note also that the Bureau's prior understanding of agency law in no way requires that a federal court find an agency relationship to exist now. For purposes of intergovernmental immunity, the applicable agency law is necessarily federal. New Mexico quite properly could change its own definition of agency so long as its new definition did not impinge on the area of immunity mandated by the Constitution.

[4] Although Congress could immunize these contractors from state taxation, it has not done so directly and congressional immunity will not be implied. *See Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U.S. 342, 365-66 (1949). The contractors may nonetheless make a claim to constitutional immunity if their connection to the government is so close that a tax on them is in reality on the government. *See Alabama*

N.M. Stat. Ann. §72-16A-12.1 (Supp. 1975) (exemption for the government); N.M. Stat. Ann. §72-16A-3F (Supp. 1975) (requirement of receipt). In addition, if the contractors are procurement agents for the government, their suppliers of tangible personal property would be entitled to a tax deduction. *See* N.M. Stat. Ann. §72-16A-14.9 (Supp. 1975).

The parties filed cross-motions for summary judgment. Most facts, including the applicable contract language, were stipulated. The district court granted the motion of the United States, finding that the contractors were disbursement and procurement agents for the government and that the United States must be permitted to intervene in the state proceedings. The district court found that in paying their own operational costs—such expenses as overhead and salaries—the contractors were merely disbursing, not receiving, federal funds. The court also found that purchases of tangible personal property, even though used in the contractors' own work, were made as agents of the government.

We agree with the district court that the United States may intervene in state proceedings. However, we believe that the law which has developed to resolve agency questions in the government contract context requires that the district court grant summary judgment to New Mexico on the agency issues.

The three contracts involved here are in most respects standard AEC management contracts—a genre of contracts developed to facilitate the AEC's heavy reliance on private industry in the construction and management of large research and development facilities. Although AEC management contracts closely resemble typical cost-plus government contracts, they also contain unusual features. For instance, they contemplate long-term relationships and vest substantial autonomy in the contractors. *See* Hiestand & Florsheim, *The AEC Management Contract Concept*, 29 Fed. B.J. 67, 68 (1969).

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v. *King & Boozer*, 314 U.S. 1, 13 (1941); *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

Under its contract, Sandia Corporation, a subsidiary of Western Electric Company, Inc., operates the Sandia Laboratories owned by ERDA. Sandia was created in 1949 to perform research and development for AEC, and it is not involved in private work. It receives no fee or profit under its contract and owns no property except the $1,000 in United States bonds constituting its nominal paid-in capital.

The Zia Company, a subsidiary of Santa Fe Industries, Inc., has been performing a variety of functions in support of ERDA's Los Alamos Scientific Laboratory since 1946. Zia performs separate private work with a distinct set of records, employees and locations. Virtually none of Zia's private property is involved in performance of its contract with ERDA.

Los Alamos Constructors, Inc. (LACI) is a subsidiary of the Zia Company. It performs construction work in support of the Los Alamos Scientific Laboratory. LACI owns no tangible personal property and procures the property needed in performance of its Los Alamos contract through Zia.

I.

The cornerstone case on whether a government contractor may share in the intergovernmental tax immunity enjoyed by the United States is *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941). There the Supreme Court upheld a sales tax levied on the purchases of cost-plus-fixed-fee contractors notwithstanding the fact that the government would ultimately pay the tax in reimbursing the contractors' costs. The Court rejected an economic impact test and decided the case on the basis of the bare legal incidence of the tax. "The asserted right of the one [sovereign] to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of [its contractors]." *Id.* at 9. The incidence of the tax was found to fall on the contractor, not the government, even though, *inter alia*, the government maintained extensive control over the contractor, the title to the goods pur-

chased subject to the tax passed directly to the government, and the government was to assume good faith obligations of the contractor upon termination of the contract.

In 1952 the Supreme Court interpreted §9(b) of the Atomic Energy Act of 1946 to be a legislative extension of governmental immunity to AEC contractors. *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232 (1952). Congress promptly repealed §9(b), Act of August 13, 1953, Pub. L. No. 83-262, 67 Stat. 575 (1953), for the express purpose of putting AEC contractors on the same footing as other government contractors, who, since the decision in *King & Boozer*, are rarely found to be immune from taxation. The Senate Report accompanying the repealer discloses a congressional sensitivity to the decreased tax bases of those states with large-scale AEC activities. S. Rep. No. 694, 83rd Cong., 1st Sess., *reprinted in* [1953] U.S. Code Cong. & Ad. News 2379, 2380.

Since the decision in *King & Boozer*, the Supreme Court has only twice been satisfied that a sufficient relationship existed between the contractor and the government to qualify the contractor for implied constitutional immunity. In *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110 (1954), the Court found a contractor to be an agent for the government for procurement and, therefore, immune from a sales tax. Language in the request for bids, the contract, and the purchase order clearly and uniformly disclosed an intention for the government to be directly obligated to the vendor for the contractor's purchases. *Id.* at 119-20. In the course of the opinion, the Court also noted the careful attention Congress has given to the proper adjustment of intergovernmental tax burdens. *Id.* at 116.

Justice Douglas, in his *Kern-Limerick* dissent, criticized the majority opinion insofar as it could be read to allow "any government functionary to draw the constitutional line by changing a few words in a contract." 347 U.S. at 126 (Douglas, J., dissenting). This concern—that immunity questions not turn on technicalities of contract drafting—reappeared in the majority opinions of the Michigan property cases decided four years later:

> Constitutional immunity from state taxation does not rest on such insubstantial formalities as whether the party using government property is formally designated a "lessee." *Otherwise immunity could be conferred by a simple stroke of the draftman's pen.*

United States v. *Township of Muskegon*, 355 U.S. 484, 486 (1958) (emphasis added). The Michigan opinions recognize Congress as "the proper agency . . . to make the difficult policy decisions necessarily involved in determining whether and to what extent private parties who do business with the Government should be given immunity from state taxes." *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 495 (1958). See also *United States* v. *City of Detroit*, 355 U.S. 466, 474 (1958). *Cf. United States* v. *Boyd*, 378 U.S. 39, 51 (1964).

In 1960 the Supreme Court affirmed, without opinion or citation, a three-judge district court determination that an AEC contractor in South Carolina was a tax-exempt government agent. *Livingston* v. *United States*, 364 U.S. 281 (1960) (per curiam), *aff'g* 179 F. Supp. 9 (E.D.S.C. 1959). The district court relied heavily on the fact that this AEC contractor undertook government work as a contribution to the defense effort rather than as a source of profit. Although the contract involved in *Livington* was typical of AEC management contracts in most respects, it provided for only a nominal one-dollar fee, and purchase orders were made on behalf of the government. 179 F. Supp. at 18. Later, in *United States* v. *Boyd*, 378 U.S. 39 (1964), the Supreme Court, considering another AEC management contract, sharply limited *Livingston* to the "'extraordinary' contractual relationship" involved and the "factual determination that [the contractor] received no benefits from the contract." *Id.* at 45 n.6.

In *Boyd*, the latest pertinent Supreme Court pronouncement, two AEC management contractors claimed exemption from a Tennessee use tax. After reviewing the contractual relationships involved, the Court affirmed the state supreme court determination that, despite extensive entanglement with the AEC, the incidence of the tax fell on the contractors' "private use" of government property

for their "own profit and gain." *Id.* at 43. The Court rejected the government's argument that the contractors were agents with the observation that they were not "constituent parts" or "instrumentalities" of the government. *id.* at 46–48. The opinion concluded by reserving to Congress the responsibility for readjustment if the Court's restricted interpretation of governmental immunity proves unworkable. *Id.* at 51.

Although there is language in these Supreme Court opinions suggesting that the results turn on traditional agency principles, *see e.g., United States* v. *Township of Muskegon*, 355 U.S. at 486, it seems evident that the Court is more concerned with preserving the delicate financial balance between our co-existing sovereignties than with rigid adherence to agency law terminology. The trend toward restricting tax immunities, *see generally* Powell, *The Waning of Intergovernmental Tax Immunities*, 58 Harv. L. Rev. 633 (1945), reflects an awareness of the serious threat posed to state revenues by ballooning governmental dealings in the private sector. *See* Note, *Federal Tax Immunity and the Legal Incidence of the Maine Sales Tax*, 29 Maine L. Rev. 149, 153–54 (1977). The Court has repeatedly deferred to Congress in this area and Congress, openly sensitive to the impact on state treasuries, has not extended tax immunity to any class of contractors.

We, too, are mindful of the tension between the power of the federal government to insulate itself from state tax burdens and the limited tax bases of state and local units. Clearly, Congress may legislatively provide tax immunity to federal contractors. In addition, under *Kern-Limerick* a federal agency may bring a contractor within the scope of intergovernmental immunity if a decision to create an agency relationship is made in advance of a dispute and is unequivocably expressed in all relevant documents.[5] The state may not similarily protect its treasury.

[5] It has been argued that tax immunity may be conferred only by the legislative branch. See L. Tribe, *American Constitutional Law* 399–401 (1978). This deference to Congress is amply supported by language

II.

With this concern for proper intergovernmental adjustments in mind, we have reviewed the assertions of each party. We dispose initially of the government's claim that the contractors do not receive, as required by the statute, see N.M. Stat. Ann. §72-16A-3F (Supp. 1975), the funds they disburse for their own salaries and overhead. As long as the contractors are separate entities solely responsible for their own employees and internal management, salaries and overhead cannot be the "obligations of another."[6] *Cf. Westland Corp.* v. *Commissioner of Rev-*

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in leading cases. See, e.g., *United States* v. *Boyd*, 378 U.S. 39, 51 (1964); *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 495 (1958). We agree that Congress is best able to adjust tax burdens, but we cannot ignore the power given to executive agencies to create relationships through contract. Although we are skeptical of cosmetic provisions drafted by government functionaries, we must find immunity when these contracts inherently and inexorably draw a private corporation so close to the government as to make it a servant. *See United States* v. *Forst*, 442 F. Supp. 920, 924-25 (W.D. Va. 1977), *aff'd*, 569 F.2d 811 (4th Cir. 1978).

[6]There is no deduction for expenses incurred in performing the service. *See* N.M. Stat. Ann. §72-16A-3K (Supp. 1975). Cf. *City of Los Angeles* v. *Clinton Merchandising Corp.*, 58 Cal.2d 675, 375 P.2d 851, 855 (1962). The statute is measured on gross rather than net proceeds; it taxes the privilege of conducting business in New Mexico, whether profitable or not. *See* N.M. Stat. Ann. §72-16A-2 (Supp. 1975). The failure of the legislature to reenact the predecessor statute's specific language prohibiting deduction for losses or expenses, *see* N.M. Stat. Ann. §72-16-2D (1953) (Emergency School Tax Act), does not alter the obvious meaning of the statute.

The government insists that Sandia, Zia and LACI are meeting the obligations of the government in paying salaries and fringe benefits, but that contractor employees have no claim against the government for labor-related grievances. *See* Record App. at 342. In other words, employees may not bargain with the government for the salaries and benefits supposedly flowing directly from the government. Acknowledging that tort liability depends on the "overall relationship between the United States and the contractor and on the control inherent in that relationship," Brief for Appellee at 48, the government nonetheless denies any tort responsibility for contractor negligence. Record App. at 342. As admitted, Sandia, Zia and LACI are not agents for the purpose of "directing the details of day-to-day research or maintenance

enue, 83 N.M. 29, 487 P.2d 1099, 1104 (Ct. App.), *cert. denied*, 83 N.M. 22, 487 P.2d 1092 (1971). The contractors are paying their own obligations and, regardless of the funding device employed, they receive the funds when they exercise dominion over them by issuing drafts to their obligees. To the extent that third parties are involved, in the procurement of goods and services for instance, it is possible that the contractors do function in an agency capacity and should, therefore, be tax exempt.

The factors urged as indicative of agency status here are not new to government contract cases. The contracts discussed in *United States* v. *Forst*, 442 F. Supp. 920 (W.D. Va. 1977), *aff'd*, 569 F.2d 811 (4th Cir. 1978), for example, contained several of the elements present here. Although the government conceded that the contractors in *Forst* were not agents, the court still analyzed the contractual characteristics necessary to make a contractor tax exempt. The court was unimpressed with the fact that all contract work was done at a government facility, 442 F. Supp. at 921, and that the government bore the risk of loss. *Id.* at 925. In addition, the court held that "it is not critical who holds the title to the purchased items as between the United States and its contractor. Nor is the degree of control over the contractor . . . critical." *Id.* at 924. See also *United States* v. *Township of Muskegon*, 355 U.S. 484 (1958). In affirming *Forst* the Fourth Circuit agreed that "the key factor in the case was whether the credit of the United States or the contractor was bound by the purchasing agreements." 569 F.2d at 811.

The argument that the contracts with Sandia, Zia and LACI inherently created agent-principal relationships is also at odds with the contracts discussed in *United States* v. *New Mexico*, 581 F.2d 803 (10th Cir. 1978). The contracts there specifically stated that the contractors were not agents but independent contractors. Ironically, those

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operations and the hiring and direct supervision of employees," Record App. at 33, but apparently only for the purpose of avoiding state taxation.

contracts were in most other respects very similar to the contracts we consider here. They provided, among other things, for the title of procured goods to pass directly to the government and for government approval of purchases over a stated amount. 581 F.2d at 804, 805.

An agency argument based on all the same factors present here was raised before the Supreme Court in *Boyd*.[7] *See* 378 U.S. at 46. The *Boyd* contractors, like Sandia, Zia and LACI, worked at a government facility with government property. They operated according to broad instructions from the AEC and obtained approval for purchases

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[7]The government challenges the applicability of *Boyd*. Concededly, *Boyd* does not decide the precise issue here but it provides us with an analogous situation in which similar considerations were weighed. In the Tennessee Supreme Court, *Boyd* focused on two questions: the imposition of state sales tax on the contractors' purchases and the imposition of a use tax on the contractor's use of AEC-owned property. *United States* v. *Boyd*, 211 Tenn. 139, 363 S.W.2d 193 (1962). The Tennessee court first found that the contractors were agents in purchasing for the AEC and therefore immune. On the second question the court concluded that, because the contractors used the property for their own benefit, the use tax was valid. Only the second finding was appealed. The United States Supreme Court noted specifically that it was not presented with the first issue and that "the validity of the contractor's use tax, as against a constitutional claim of immunity, in no way depends on the legality of the sales tax." *United States* v. *Boyd*, 378 U.S. 39, 43 n.5 (1964). We read this footnote neither as an approval of the state court's treatment of the issue not appealed, nor as a limit on the application of the Court's opinion to cases resembling the first issue. The Court merely noted that the two aspects of the taxing statute could be independently considered.

Because an agency issue was raised in *Boyd*, the applicability of the case turns on whether the taxed activity in *Boyd* is entirely distinguishable from the activities Sandia, Zia and LACI allegedly perform as agents. We think not. Using government property in the course of performing a government contract is not unlike incurring obligations to achieve the same end. If advanced funding is, as we believe, another form of reimbursement, the government has no different interest in a cost-type contractor's process of incurring and paying obligations than in any other function necessary to reach the desired result. Unless contract provisions provide otherwise, the government's interest dominates only in the result sought to be obtained by contract—here, research and development. *See* note, 13, *infra*.

above a stated figure. Title to property procured by the contractors passed directly to the government, which also bore the risk of loss. They also used advanced funding. The Court, in dismissing the agency claim, applied what may be even more stringent standards than we apply here. It found that the contractors were not "so assimilated by the Government as to become one of its constituent parts," 378 U.S. at 47 (quoting *United States* v. *Township of Muskegon*, 355 U.S. at 486), nor "so incorporated into the government structure as to become instrumentalities of the United States and thus enjoy governmental immunity." 378 U.S. at 43. This instrumentality language parallels the Atomic Energy Act which defines "Government agency" to include only those independent establishments or corporations which are wholly or partly owned by the government and which are also instrumentalities. 42 U.S.C. §2014(1). The government concedes that Sandia, Zia and LACI are not instrumentalities. Record App. at 345.

A number of other contractual features have been brought to our attention, but we find them either insubstantial or so common to government contracts generally that they have no particular bearing on the issue of agency. Characteristics common to virtually all AEC management contracts, even through not found in the contracts of other agencies, also have little impact on our determination. The repeal of §9(b) of the Atomic Energy Act illustrates congressional aversion to the notion that AEC contractors as a group are more entitled to tax immunity than are other federal contractors. Our reiterated antipathy to wholesale deprivations of state treasuries without congressional action, requires, at the least, some special arrangement before tax immunity attaches.

The government places emphasis on the fact that Sandia, Zia and LACI receive "advanced funding" from the ERDA rather than reimbursement for expenses. The contractors pay their creditors and employees with drafts drawn on a special bank account in which United States Treasury funds are deposited, under the authority of a let-

ter of credit, to cover withdrawals.[8] While the court in *Boyd* was no more impressed with the advanced funding aspect of the contracts it reviewed than with any other features, we find it worthy of discussion. On the surface advanced funding does appear to give the contractor the power to pledge the credit of the government—a significant indicator of agency status. *See Alabama* v. *King & Boozer*, 314 U.S. at 13-14; *United States* v. *Forst*, 442 F. Supp. 920, 925 (W.D. Va. 1977), aff'd, 569 F.2d 811, 811 (4th Cir. 1978).

Despite appearances, however, advanced funding does not create in the contractor the power to create obligations of the government as an agent.[9] At most, the con-

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[8]The steps involved in advanced funding are: (1) The contractor, the United States, and a designated bank open a special bank account pursuant to a three-party contract. The United States owns any balance in the account, but the contractor is given the right to execute drafts payable to third parties in order to satisfy any expenses incurred in performing the underlying government contract, *see* Record App. at 206-07, 209-18; (2) ERDA issues a letter of credit to an appropriate Federal Reserve Bank in favor of the contractor; this letter of credit provides the general authority for this Federal Reserve Bank to make United States Treasury funds available for deposit in the special bank account, *see* Record App. at 206-07, 220-21, 223, 224; (3) when a contractor incurs a contract expense, the contractor pays the expense by executing a draft payable to the creditor and drawn on the special bank account, *see* Record App. at 206-07; (4) at the time the contractor executes a draft on the special bank account, the contractor or the bank executes a payment voucher in an amount sufficient to cover the draft. This voucher is forwarded to the appropriate Federal Reserve Bank. The Federal Reserve Bank in turn deposits an equivalent sum to the account of the designated bank of deposit, and the designated bank of deposit credits the special bank account with funds sufficient to cover the draft. *See* Record App. at 205-08-, 219-22.

[9]The government asserts that it considers obligations properly incurred by Sandia, Zia and LACI to be obligations of ERDA. *See* Brief for Appellee at 35; Record App. at 207, 168, 173-74, 179, 338, 383. It is clear from the record, however, that this assertion is founded on the government's view of the ramifications of advanced funding and the fact that ERDA would not deny a valid claim arising from contract performance in the absence of sufficient advanced funds. *See* Record App. at 369-71. We are not bound by the government's assertion of

tractor may pledge to the limits of its letter of credit. Seen in this light, Sandia, Zia and LACI are like numerous businesses which deal under letters of credit from banks and other sureties. In fact, the federal government finances many organizations through letters of credit and advanced funding for which no claim of agency relationship could seriously be made. *See, e.g.*, Record App. at 237–42. Federal regulations allow letters of credit to be issued to "any State and local government educational institution, international organization and any other public and private organization." 31 C.F.R. §205.3(a). Like guarantees, advanced payment from customers does not transform independent contractors into agents.

Advanced funding is simply another means of reimbursement devised by accountants to eliminate major weaknesses in the government's bookkeeping practices:

> [Government agencies'] general practice when operating through private contractors on a reimbursable-cost basis, has been to record the initial sums paid such contractors as advances and to reflect costs in the Government's accounts only when contractors' expenditures have been audited and reimbursed by the Government. This practice has two basic weaknesses in the accounting . . .:
>
> (1) A considerable lag in time exists between the dates when the contractor incurs costs and when the Government accounts record the expenditures.
>
> (2) It is extremely difficult for the Government to break down the records of these expenditures so as to obtain a useful cost analysis . . . .

Fifth Semiannual Report of the Atomic Energy Commission 132 (1949), Record App. at 376. Advanced funding also encourages companies to undertake government con-

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direct liability because we believe advanced funding to be just another form of reimbursement, and ERDA responsibility for properly incurred claims to be inherent in all cost-type contracts. *See* 32 C.F.R. §7–402.2 (1976). The decision that cost reimbursement would not make government contractors into agents has been made for us. *See Alabama* v. *King & Boozer*, 314 U.S. 1 (1941).

tracts for little or no fee because it insulates contractors from the costs and risks of borrowing funds to meet contract obligations. Record App. at 208. Official documents make no distinction, other than for accounting purposes, between contractors which do or do not use advanced funding, *see* Ninth Semiannual Report of the Atomic Energy Commission 57–59 (1951), Record App. at 331–33, and we do not believe any distinction is warranted. As a matter of law, federal contractors are not transformed into tax-exempt agents by a federal agency's decision to change accounting practices or to simplify methods of payment.[10]

One of the contracts in this case requires particular consideration in light of *United States* v. *Livingston*, 179 F. Supp. 9 (E.D.S.C., 1959), *aff'd*, 364 U.S. 281 (1960). Sandia receives no fee for the performance of its contract with the government.[11] In *Livingston* a federal contractor was found to be a tax-exempt procurement agent because, among other things, its contract provided for only a one-dollar fee and was undertaken out of a "high sense of public responsibility" and "without hope of gain." 179 F. Supp. at 23, 18. Although we have doubts that such a factual determination would today withstand appellate review[12] we recognize the theoretical possibility that a "genuine issue of material fact" might be created on this

[10]The AEC had 43 contractors on advanced funding as of 1973. Ten were in New Mexico and 34 were private corporations. AEC Manual, Appendix 1101, Part III, §A at 5–6 (March 1973); Record App. at 388. As of 1977, 165 ERDA contractors had letters of credit and more than 8,000 are currently being issued to contractors by other federal agencies under general statutes and regulations authorizing advanced funding. *See* Record, Vol. 6, at 9 (McGrath depo.); 41 U.S.C., §255 (a)(1); 41 C.F.R. §§1–30.400 *et seq.* (1979); 31 C.F.R. §205.1–10 (1979).

[11]Zia and LACI receive fixed fees annually for work performed under their contracts with ERDA. Gross receipts taxes are paid on their fees. Record App. at 27. This challenge is limited to the funds used to pay their employees, suppliers and overhead.

[12]There are business advantages for ERDA contractors more valuable than a fee, for example, the acquisition of invaluable technical and engineering information and experience and the possibility of acquiring valuable patents as an outgrowth of research and development activities conducted at federal expense. Newman, *The Atomic Energy*

question. Nevertheless, we do not believe that this potential factual issue requires remand for a trial. The Supreme Court has limited *Livingston* not only to its peculiar "factual determination," but also to the "'extraordinary' contractual relationship" exhibited there. *United States* v. *Boyd*, 378 U.S. at 45 n.6. As we have indicated, the contracts here in issue are not extraordinary.

As with advanced funding, decisions on the amount of fee, if any, to be paid a government contractor are not made primarily with agency consequences in mind. The regulations provide for fee negotiations with each contractor, taking into account such factors as tax posture. *See* ERDA-PR Temporary Reg. No. 17, April 2, 1976, Record App. at 390–94. Without more, we decline to hang agency status, and thereby the welfare of state treasuries, on the existence or amount of a fee.

There is one final aspect of the contracts with Sandia, Zia and LACI which demands our attention. During the course of this litigation, the local ABC contracting officers in New Mexico modified these three contracts to refer directly to the contractors as agents, apparently in an attempt to fall within the shelter of *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110 (1954), and to avoid New Mexico's argument that the omission of agency terminology was intentional. By their terms, however, the amendments add

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Industry: An Experiment in Hybridization, 60 Yale L.J. 1263, 1320–21 (1951). And while obtaining these benefits, Sandia is protected from usual business risks by advanced funding. Moreover, Sandia's profit-conscious parent, Western Electric, and its affiliates, *e.g.*, American Telephone & Telegraph Company, receive many benefits from Sandia's performance of the ERDA contract. They reserve nonexclusive, irrevocable, royalty-free licenses under any communication-related patents taken on discoveries made by Sandia. *See* Sandia Contract, Mod. No. 29, Art. IX, §1, Record App. at 142–43. The government pays Sandia's overhead and the salaries of parent-company employees who may be used or trained in the course of Sandia's operations. *See* Sandia Contract, Mod. No. 29, App. A, Art. III, §1, Record app. at 151. Through Sandia's contract, Western Electric and Bell Telephone Laboratories, Inc., are also paid for furnishing auditing services, research and development, products, and supervisory services. *See* Sandia Contract, Mod. No. 29, App. A, Art. III, §2-5, Record App. at 152–53.

nothing substantive to the contracts. To be sure, they state that the "contractor acts as an agent for and on behalf of ERDA for certain purposes." But they conclude with the caveat:

> The purpose of this article is to recognize and express existing relationships. This article shall not be construed to modify any other provisions of the contract . . . nor shall it create rights or obligations not otherwise provided for in the contract.

Zia Contract, Mod. No. M069, Record App. at 174. *See also* Sandia Contract, Mod. No. 30, Record App. at 169; LACI Contract, Mod. No. M059, Record App. at 179. Because we are convinced that, as a matter of law, the provisions of the contracts before the amendments did not establish agency status, we need not be swayed by amendments which make no changes.

It is also significant that the agency terminology does not appear uniformly in all the documents relating to the contracts. The "Standard Terms and Conditions accompanying their Purchase Orders" clearly distinguish between the "Buyer"—Sandia, Zia or LACI—and the "Government." Record App. at 247. Sandia's contract requires it to make purchase orders and subcontracts in its own name. Sandia Contract, Mod. No. 29, Art. XI, §2, Record App. at 145.

We are highly skeptical of the sporadic addition of "magic words" to a contract in an attempt to avoid state taxation. The importance of proper intergovernmental tax adjustments obligates us to require much more when the power to create agents is being exercised by the executive branch. While Congress may confer tax immunity in a word, an executive agency must clearly manifest the principal-agent relationship with all its ramifications if state taxation is to be precluded. There is not a clear manifestation here.

III.

On the final issue the district court determined that "the United States is the real party in interest and should be

recognized as a party in any New Mexico administrative tax proceeding involving the three contractors involved herein or their vendors." Record App. at 34. Our decision on the agency issues removes the rationale of the district court's determination. However, we are unwilling to conclude that the United States may properly be excluded, under all circumstances, from state tax proceedings involving these contractors.

Determination of the "real party in interest," as a matter of procedural fairness, should not be made in the absence of any possible relevant party. The United States must be permitted to intervene in the administrative proceedings to advocate on the facts its status as the real taxpayer. In fact, New Mexico courts and the Bureau of Revenue *have* permitted United States participation when "the contracts with Zia and LACI obligate the United States to provide funds necessary to defray all costs incurred in the performance of the contracts, including taxes." *United States* v. *Bureau of Revenue*, 87 N.M. 164, 531, P.2d 212, 213 (Ct. App. 1975). Participation is important in creating the full record necessary for appellate review should the Bureau deny the government's taxpayer claim. Finally, New Mexico provides us with no examples of prejudice that would result from United States participation. Cf. County of San Bernardino v. Harsh California Corp., 52 Cal. 2d 341, 340 P.2d 617, 621 (1959). Instead, the State admits its willingness to permit *de facto* government participation through representation of the contractors by the United States Attorney's office. Brief for Appellant at 60–61. Full participation by the United States would thus protect the United States without damaging any real interest of the state.

IV.

The district court should enter summary judgment in favor of New Mexico on the agency issues and the United States on the administrative proceeding issue:

1. Sales of tangible personal property to the ERDA, through its management contractors Sandia and Zia, are subject to the New Mexico gross receipt tax.

2. Advanced funds used for government operations under ERDA management contracts with Sandia, Zia and LACI are subject to the New Mexico gross receipts tax.

3. The United States has the right to participate in administrative tax proceedings wherein tax liabilities of Sandia, Zia and LACI are at issue.

APPENDIX C

In the United States Court of Appeals

FOR THE TENTH CIRCUIT

MAY TERM—JUNE 2, 1980

Before The Honorable ROBERT H. MCWILLIAMS, *Circuit Judge*, The Honorable JAMES E. BARRETT, *Circuit Judge*, and The Honorable MONROE G. MCKAY, *Circuit Judge*

UNITED STATES OF AMERICA, Plaintiff—Appellee,

vs.

STATE OF NEW MEXICO, BUREAU OF REVENUE OF THE STATE OF NEW MEXICO; AND FRED L. O'CHESKEY AS COMMISSIONER OF REVENUE OF AND FOR THE STATE OF NEW MEXICO, AND HIS SUCCESSORS IN OFFICE, DEFENDANTS—APPELLANTS

JUDGMENT

No. 78-1755
(D.C. No. 75-418-M)

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed in part and affirmed in part. The cause is remanded to the United States District Court for the District of New Mexico with instructions that it enter summary judgment in favor of New Mexico on the agency issues and in favor of the United States on the administrative proceeding issue:

1. Sales of tangible personal property to the ERDA, through its management contractors Sandia and Zia, are subject to the New Mexico gross receipts tax.

2. Advanced funds used for government operations under ERDA management contracts with Sandia, Zia and LACI are subject to the New Mexico gross receipts tax.

3. The United States has the right to participate in administrative tax proceedings wherein tax liabilities of Sandia, Zia and LACI are at issue.

/s/ Howard K. Phillips

HOWARD K. PHILLIPS
Clerk

APPENDIX D

N.M. Stat. Ann. 1953 (Supp. 1975):

§ 72-16A-3. *Definitions.*—As used in the Gross Receipts and Compensating Tax Act [72-16A-1 to 72-16A-19]:

* * * * *

B. "buying" or "selling" means any transfer of property for consideration or any performance of service for consideration;

* * * * *

E. "engaging in business" means carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit;

F. "gross receipts" means the total amount of money or the value of other consideration, received from selling property in New Mexico, from leasing property employed in New Mexico or from performing services in New Mexico, and includes any receipts from sales of tangible personal property handled on consignment but excludes cash discounts allowed and taken, New Mexico gross receipts tax payable on transactions for the reporting period and taxes imposed pursuant to the provisions of the County Sales Tax Act [13-2-30 to 13-2-35], the County Gross Receipts Tax Act [15-55-1 to 15-55-15] or the Municipal Gross Receipts Tax Act [14-61-1 to 14-61-8] which are payable on transactions for the reporting period and any type of time-price differential.

In an exchange in which the money or other consideration received does not represent the value of the property or service exchanged, "gross receipts" means the reasonable value of the property or service exchanged.

* * * * *

"Gross receipts," for the purposes of the business of buying, selling or promoting the purchase, sale or leasing, as factor, agent or broker, on a commission or fee basis, of any property,

service, stock, bond or security, includes only the total commissions or fees derived from the business;

* * * * *

L. "use" or "using" includes use, consumption or storage other than storage for subsequent sale in the ordinary course of business or for use solely outside this state.

§ 72-16A-4. *Imposition and rate of tax—Denomination as "gross receipts tax."*—A. For the privilege of engaging in business, an excise tax equal to four per cent [4%] of gross receipts is imposed on any person engaging in business in New Mexico.

B. The tax imposed by this section shall be referred to as the "gross receipts tax."

§ 72-16A-7. *Imposition and rate of tax—Denomination as "compensating tax."* —A. For the privilege of using property in New Mexico, there is imposed on the person using property an excise tax equal to four per cent [4%] of the value, at the time of acquisition or of introduction into the state, whichever is later, or of conversion to use by the manufacturer of property that was:

(1) manufactured by the person using the property in the state;

(2) acquired outside this state as the result of a transaction that would have been subject to the gross receipts tax had it occurred within this state; or

(3) acquired as the result of a transaction which was not initially subject to the compensating tax imposed by subsection A(2) of this section of the gross receipts tax but which transaction, because of the buyer's subsequent use of the property, should have been subject to the compensating tax imposed by subsection A(2) of this section or the gross receipts tax.

B. For the privilege of using services rendered in New Mexico, there is imposed on the person using such services an excise tax equal to four per cent [4%] of the value of the services at the

time they were rendered. The services, to be taxable under this subsection, must have been rendered as the result of a transaction which was not initially subject to the gross receipts tax but which transaction, because of the buyer's subsequent use of the services, should have been subject to the gross receipts tax.

C. The tax imposed by this section shall be referred to as the "compensating tax."

* * * * *

§ 72-16A-12. *Exemptions.*—Exempted from the gross receipts or compensating tax are those receipts or uses exempted in sections 72-16A-12.1 through 72-16A-12.30 NMSA 1953.

§ 72-16A-12.1 *Exemption—Gross receipts tax—Governmental agencies.*—Exempted from the gross receipts tax are the receipts of the United States or any agency or instrumentality thereof or the state of New Mexico or any political subdivision thereof.

* * * * *

§ 72-16A-12.2. *Exemption—Compensating tax—Governmental agencies—Indians.*—Exempted from the compensating tax is the use of property by the United States or any agency or instrumentality thereof or the state of New Mexico or any political subdivision thereof.

* * * * *

§ 72-16A-14. *Deductions.*—In computing the gross receipts tax due, only those receipts specified in sections 72-16A-14.1 through 72-16A-14.32 NMSA 1953 may be deducted. Receipts, whether specified once or several times in sections 72-16A-14.1 through 72-16A-14.32 NMSA 1953, may be deducted only once from gross receipts.

* * * * *

§ 72-16A-14.9. *Deduction—Gross receipts tax—Sales to governmental agencies.*—Receipts from

selling tangible personal property, other than nonfissionable metalliferous mineral ore, to the United States or any agency or instrumentality thereof or the state of New Mexico or any political subdivision thereof may be deducted from gross receipts. Receipts from selling tangible personal property, other than nonfissionable metalliferous mineral ore, to the governing body of any Indian tribe or Indian pueblo for use on Indian reservations or pueblo grants, may be deducted from gross receipts.

* * * * *

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